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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 104

BUCK JONES AND TAFT HAITHCOCK,
D/B/A JONES AND HAITHCOCK USED CARS,
Petitioners

v.

A. M. HARPER, MAJOR GENERAL,
UNITED STATES ARMY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Western District of Oklahoma (R. 33-35) is reported at 98 F. Supp. 460. The opinion of the Court of Appeals for the Tenth Circuit (R. 91-94) is reported at 195 F. 2d 705.

JURISDICTION

The judgment of the Court of Appeals was entered on March 27, 1952 (R. 94-95). The petition for a writ of certiorari was filed on June 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below erred in holding that a commanding officer did not exceed his authority in placing off limits a business establishment which he had reason to believe dealt unfairly with the men under his command.

STATUTE AND REGULATION INVOLVED

Section 20 of the Act of July 15, 1870, Chapter 294, 16 Stat. 315, 319, as amended, 18 Stat. 337 (10 U. S. C. 16), provides:

> The President is authorized to make and publish regulations for the government of the Army in accordance with existing laws, which shall be in force and obeyed until altered or revoked by the same authority: *Provided,* That said regulations shall not be inconsistent with the laws of the United States.

Army Regulation 600-10 (Personnel, Military Discipline), issued November 10, 1950, provides in pertinent part:

> 29. *Off limits*—a. To assist responsible commanders in maintaining discipline and

safeguarding the health and welfare of military personnel, establishments and areas may be declared "off limits" for troops, in which case military personnel are prohibited from entering them. * * *

STATEMENT

In December, 1950, Lt. Richard D. Bacon, a student officer stationed at The Artillery School, Fort Sill, Oklahoma, complained that the petitioners, who were engaged in the used car business at Lawton, Oklahoma, near Fort Sill, had sold him, for $3,055, a used Pontiac, representing it as new, and thereafter, on his discovery of the misrepresentation, had refused to rescind the transaction (R. 16-20, 28-29, 75). The Legal Assistance Officer and other staff officers investigated the case (R. 56-58, 75, 77-78). After conferring with petitioners and concluding that the car represented as new was actually a used car, they suggested that petitioners make the matter right (R. 64) and advised them that if adjustment were refused they would recommend issuance of an off limits order (R. 57-60, 64, 67-68, 77-78). On petitioners' refusal to undo the deal, opportunity was given petitioners to make a statement for incorporation in the report to General Harper (R. 61). After due consideration of these facts, the respondent issued the "off limits" order, which read in pertinent part as follows: "Off Limits Bulletin, Number 7, 13 February 1951. 1.

Restriction: The following establishments in Lawton, Oklahoma, is declared 'off limits' to all military personnel: Jones & Haithcock Used Cars, 101 North Second Street." (R. 4, 71).

A complaint naming the commanding officer as the sole defendant was filed by petitioners, asserting that the order deprived petitioners of property without due process of law and seeking an injunction (R. 1-5). A motion to dismiss was overruled (R. 43, 47), and after trial the District Court decided in petitioners' favor on the ground that the authority conferred by Paragraph 29 of Army Regulation 600-10 embraced "only situations where the discipline, health or moral welfare of military personnel is involved" (R. 33, 41). The court permanently enjoined the defendant from enforcing the order (R. 41).

On appeal, the court below held that the commanding officer had acted within his authority to determine what action was necessary to safeguard the welfare of military personnel. The court found that the suit was in fact one to review an exercise of discretionary judgment by the commanding general and was, therefore, a suit against the United States. It directed dismissal of the complaint (R. 94-95).

ARGUMENT

If the respondent acted within his authority, the correctness of his decision as to how to exercise the discretion placed in him may not be reviewed by

the courts. *United States* v. *Eliason*, 16 Pet. 291; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682. The question, therefore, was not whether the respondent was correct in his determination that placing the petitioners' establishment off limits was necessary for the welfare of the military personnel under his command, but whether he had authority to make such a determination and whether he followed appropriate procedures in reaching his decision. Despite the allegations to the contrary in the petition (Pet. 8-9), the decision of the court below is fully in accord with the holdings in other circuits and in this Court, and the only real issue is a narrow one of the construction of the army regulation, which does not warrant review by this Court.

The testimony makes it clear that the petitioners' property was placed off limits because the commanding general believed, on the basis of an investigation by officers under his command, that such action was necessary in order to prevent military personnel from being cheated (R. 67-68, 72-73).[1] To be sure, the necessity for the action

[1] Although motives of the commanding general are immaterial (*Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139), the circumstance that he was not acquainted with petitioners (R. 70), nor the particular lieutenant who made the purchase, disposes of any accusation of improper, personal, or discreditable motives or animus, and indicates that his motivation was solely interest in the welfare of the men in his command.

came to his attention because of the specific transaction between the petitioners and Lt. Bacon, but the purpose and effect of the order was not to settle that dispute, but was to protect army personnel against repetition of that experience (R. 72-73). It was certainly not improper for the investigating officers to suggest a settlement of the particular dispute, since such action on the part of the petitioners would have been some indication of their good faith, bearing on the necessity of issuing the order.

Apparently, the position of the petitioners, which was adopted by the District Court, was that authority to place establishments off limits is restricted to situations where the morals and physical welfare of army personnel are imperiled. There is no basis for this limited interpretation of Army Regulation 600-10, paragraph 29(a). On the contrary, it would seem that the protection of army personnel from dishonest merchants may well be as important to their morale and as necessary for the welfare of the service as protections from other types of interference with their well-being. Cf. *Northern Pacific R. Company* v. *United States,* 330 U. S. 248, 255 (materials for the construction of a bowling alley held to be military property); and *Standard Oil Co. of California* v. *Johnson,* 316 U. S. 481 (establishment of post exchanges is authorized). Therefore, this case seems to fall squarely within the decision in *Ains-*

worth v. *Barn Ballroom Co.*, 157 F. 2d 97 (C. A. 4), broadly upholding the competence of military authorities to make dance-halls, or other places or areas, out of bounds to military personnel.

Petitioners assert that since their property interest in carrying on their business is affected by the order, it could not legally have been issued except after a hearing (Pet. 13-14). This is a novel proposition which, if carried to its natural conclusion, would require hearings in such diverse circumstances as decisions of where army posts are to be established or disestablished, the setting up of post exchanges, or determinations as to how much off-post liberty shall be granted to military personnel. All of these orders and innumerable others have an immediate, and in many cases disastrous, effect upon business establishments of one kind or another. But the authority and duty of an army officer is to protect his men, and the effect which his orders may have on business establishments does not give them a legal basis for complaint (*Ferris* v. *Wilbur*, 27 F. 2d 262 (C. A. 4)).

Petitioners erroneously rely upon *Joint-Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. Aside from the fact that it deals with an entirely different type of problem, that case is inapplicable because it does not involve the peculiar relationship between the army and its personnel, which is in many respects as complete and absolute as between a parent and a child. *Cf. In re Morrissey*, 137 U. S. 157; *United*

States v. *Williams*, 302 U. S. 46; *United States* v. *Standard Oil Co.*, 332 U. S. 301. Would petitioners contend that a motion picture theater operator has a legal right to complain when a parent determines that the theater is "off limits" for his child? The effect on petitioners was incidental and consequential to a protective exercise of quasi-paternal power over military personnel. *Pyeatte* v. *Board of Regents of University of Oklahoma*, 102 F. Supp. 407 (W. D. Okla.), motion to affirm granted, 342 U. S. 936; *Rowan* v. *Butler*, 171 Ind. 28; and *Gott* v. *Berea College*, 156 Ky. 376.

Moreover, the record in this case clearly indicates that the action of the commanding general was not taken arbitrarily or without due investigation. The facts in the case were thoroughly investigated by staff officers (R. 56-58, 75, 77-78), and the petitioners were given full opportunity to establish their good faith (R. 64), and to state their side of the dispute in the report to the commanding general (R. 61). Therefore, even if it be assumed that their interest was such that they had legal rights to be protected, due process did not require a formal hearing. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 161-162.

CONCLUSION

No new or broad question is presented by this petition. The holding of the court below is not in conflict with prior decisions. For the foregoing reasons, it is respectfully submitted that

the petition for a writ of certiorari should be denied.

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